BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions	)	
of Digital Television	)	CS Docket No. 98-120
Broadcast Stations	)	
	)	
Amendments to Part 76 of the	)	
Commission's Rules	)	

COMMENTS OF MEDIAONE GROUP, INC.

Susan M. Eid
David Rubashkin
Margaret Sofio
MediaOne Group, Inc.
1919 Pennsylvania Avenue, N.W.
Suite 610
Washington, D.C. 20006
(202) 261-2000

October 13, 1998

TABLE OF CONTENTS

PAGE NO.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions	)	
of Digital Television	)	CS Docket No. 98-120
Broadcast Stations	)	
	)	
Amendments to Part 76 of the	)	
Commission's Rules	)	

COMMENTS OF MEDIAONE GROUP, INC.

I. INTRODUCTION AND SUMMARY

MediaOne Group, Inc. ("MediaOne") believes that Commission intervention in the transition to digital television is both unnecessary and premature. Cable operators and broadcasters already are making significant progress negotiating carriage of digital signals and resolving technical issues through industry standards-setting bodies. For example, nine broadcasters that have announced their intention to launch digital services in 1998 are within MediaOne's cable franchise areas. MediaOne already has negotiated a digital carriage provision in the retransmission consent agreement with eight of these broadcasters. In fact, of the 187 retransmission consent agreements MediaOne has negotiated, 62 (or nearly one-third) already have digital carriage provisions. These agreements, many of which were negotiated as far back as 1993, cover markets with 3.3 million subscribers, or nearly 68% of MediaOne's customer base. MediaOne plans to enter into discussions with other broadcasters regarding digital carriage and believes that other cable operators also plan to engage in such discussions.

Similarly, industry groups are well on their way to resolving the key technical issues raised by cable carriage of digital broadcast signals. Standards for a digital high-speed interface, digital channel positioning, and digital modulation techniques are only a few important examples of these ongoing industry efforts.

Commission intervention into the digital transition is premature because of the highly complex and dynamic nature of the digital video marketplace. Government regulation and government-prescribed technical standards are particularly damaging when imposed upon industries undergoing a high level of technological change, or where technology is at a nascent stage of development. Digital television has both characteristics -- it is an infant technology and is evolving in an extraordinarily complex and dynamic marketplace. As a result, there is a substantial chance that government intervention at this critical point would freeze the current level of technology and stifle the development of new technologies. Stated another way, because technology is in such a state of flux, there is insufficient information for the Commission to regulate digital video.

In light of the significant progress being made by the cable and broadcast industries to negotiate carriage of digital signals and to establish technical standards for such carriage, as well as the highly dynamic and complex nature of the digital video marketplace, the Commission should not adopt digital must carry rules during the transition period.

Such an approach is particularly warranted because transitional digital must carry would ignore consumer preferences simply to afford undeserved preferential treatment to broadcasters' digital feeds. Digital must carry, by guaranteeing broadcasters access to cable capacity for their digital feeds, would limit cable operators' ability to add new and diverse programming that

consumers really desire. This problem would be particularly acute during the transition period if two signals per broadcaster were afforded preferential status.

A transitional digital must-carry rule also would reduce program diversity and program quality. The reduction in diversity would occur because many broadcasters have announced their intention to duplicate their analog programming on their digital channel, and, in fact, the Commission's rules require such simulcasting. This means that during the transition consumers will be denied innovative services in favor of duplicative broadcast content. Similarly, if cable operators are forced to carry digital broadcast signals, then they may not have sufficient capacity to carry a non-broadcast programmer's service even if it is superior in quality.

Given that digital TVs are expected to cost about $7,000-$10,000 initially, consumer preferences would be ignored and program quality and diversity would be diminished so that a handful of upscale consumers can watch largely duplicative broadcast programming on their new expensive TVs. This is simply an indefensible public policy result.

Nor does expanded channel capacity achieved through system upgrades solve the problems inherent in imposing digital must carry during the transition. Upgrades are undertaken to enable cable operators to provide consumers with services they have requested, such as new non-broadcast video services, additional premium services, multiplexed versions of existing premium services, multiple channels of pay-per-view, and digital music services, as well as high-speed data services, Internet connectivity, and the delivery of competitive telephony services. Thus, even in upgraded systems, transitional digital must carry could deprive consumers of innovative and diverse video and non-video services they highly desire.

Of course, Commission regulation in this area at any point in time would only be justified if the Commission has the statutory and constitutional authority to support such regulation. As

demonstrated in Sections III and IV below, however, the Commission is without such authority during the transition period.

For example, the plain language and legislative history of Section 614(b)(4)(B) -- the only provision in the Act to address cable operator carriage of digital broadcast signals -- demonstrates Congress' intent to ensure retransmission of a high-quality signal by cable operators after completion of the conversion by broadcasters to an advanced television format, rather than an intent to expand the carriage requirement to include an additional digital broadcast signal during the transition period. Moreover, mandatory carriage of both a broadcaster's analog and digital signals during the transition period is expressly precluded by the non-duplication provision in Section 614(b)(5).

In addition, the directive in Section 614(b)(7) that all must-carry signals be viewable by all cable subscribers further illustrates that Congress did not intend digital must carry during the transition. If transitional digital must carry were imposed, Section 614(b)(7) would require nearly all of the nation's 65 million cable subscribers (i.e., those who have not purchased expensive digital TVs) to lease or purchase a set-top device to translate broadcasters' largely duplicative digital feeds into NTSC signals that are "viewable" on their analog TVs. It is far-fetched to believe that when Congress enacted must carry in 1992, it intended to impose on all cable subscribers such substantial additional costs.

Since there is no statutory provision expressly authorizing the Commission to adopt a transitional digital must-carry rule, the Commission is precluded from doing so by Section 624(f), which prohibits the "impos[ition of] requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Communications Act]." (emphasis added)

Likewise, any digital must-carry requirement during the transition period would violate the First Amendment. The Commission cannot demonstrate that the imposition of digital must-carry rules during the transition period is necessary to further the governmental interest established under Section 614 and upheld by Turner II. Turner II found that the loss of cable carriage in the analog context threatened to decrease broadcasters' ratings and, ultimately, their advertising revenues and financial stability. By contrast, there will be no time during the transition period when a broadcaster's analog signal will not be carried by a cable operator. Thus, there is no chance that a broadcaster's viability, let alone the viability of the entire broadcasting industry, will be threatened during the transition period by the absence of digital must carry.

Even assuming the Commission has authority to assert a new governmental interest not articulated in Turner II, it will be unable to develop the level of evidence necessary to meet the extremely high burden established by the Quincy and Century court cases due to the non-existence of marketplace facts on which the Commission could base any predictive judgments about the need for transitional digital must-carry rules. For these reasons, digital must carry during the transition period would fail the first prong of the intermediate First Amendment scrutiny standard, i.e., that any restriction on speech be necessary to support an important or substantial governmental interest.

It would also fail the second prong of the intermediate scrutiny standard, requiring that any restriction on speech be "narrowly tailored." The burden that would be placed on cable operators' speech by transitional digital must-carry rules would be significant, and far greater than the burden imposed by the analog must-carry rules. For example, a critical part of the justification of analog must carry in Turner II was that the analog regulations did not burden substantially more speech than necessary because cable operators had carried most broadcast signals prior to

the implementation of the rules. By contrast, cable operators currently carry no digital broadcast signals. Therefore, each additional digital broadcast service afforded mandatory cable carriage would result in a 100% increase over current digital broadcast carriage, thereby significantly infringing on a cable operator's editorial discretion.

In the end, there simply is no statutory, constitutional, or public policy basis for affording broadcasters preferred status for their digital feeds during the transition period, particularly when such forced carriage would cause significant harm to consumers, cable operators, and cable programmers.

II. IT IS BOTH UNNECESSARY AND PREMATURE FOR THE COMMISSION TO IMPOSE DIGITAL MUST CARRY DURING THE TRANSITION, AND SUCH A REQUIREMENT WOULD IGNORE CONSUMER PREFERENCES AND REDUCE PROGRAM DIVERSITY AND QUALITY SIMPLY TO AFFORD UNDESERVED PREFERENTIAL TREATMENT TO BROADCASTERS' DIGITAL FEEDS.

In Sections III and IV, infra, MediaOne demonstrates that the Commission lacks statutory authority to impose digital must carry during the transition period and that, in fact, a requirement that cable operators carry digital broadcast signals during the transition period is unconstitutional under the First Amendment.

However, even assuming arguendo that digital must carry during the transition period were both constitutional and within the Commission's power, the Commission should not adopt such a requirement. Given the significant progress being made by the cable and broadcast industries to negotiate carriage of digital signals and to establish technical standards for such carriage, as well as the highly dynamic and complex nature of the digital video marketplace, Commission intervention is unwarranted and unwise. This is particularly true since a transitional digital must-carry requirement would ignore

consumer preferences and reduce program diversity and quality simply to afford undeserved preferential treatment to broadcasters' digital feeds.

A. A Digital Must-Carry Rule Is Entirely Unnecessary Given That MediaOne And Other MSOs Are Actively Negotiating With Broadcasters And Pursuing Standards-Setting Efforts That Will Resolve The Issues Raised In The Notice.

Commission intervention into the digital transition is unnecessary since the marketplace already is working to resolve the issues raised in the Notice. For example, as discussed below, MediaOne and other cable operators have made and continue to make significant progress in terms of carriage negotiations with broadcasters and industry standards-setting efforts.

1. Cable Operators And Broadcasters Already Are Successfully Negotiating Carriage Of Digital Broadcast Signals.

MediaOne has made significant progress negotiating carriage of broadcasters' digital feeds. Nine of the broadcasters that have announced their intention to launch digital services in 1998 are within MediaOne's cable franchise areas. Each of these broadcasters is currently providing analog service on MediaOne's systems pursuant to a retransmission consent agreement. MediaOne already has reached a digital carriage agreement with eight of these broadcasters. These agreements are contained in the existing retransmission consent contracts. In fact, of the 187 retransmission consent agreements MediaOne has negotiated, 62 (or 33%) already have digital carriage provisions. These agreements, many of which were negotiated as far back as 1993, cover markets with 3.3 million subscribers, or nearly 68% of MediaOne's customer base. The digital carriage provisions generally are of four types and require MediaOne to: (1) carry the digital broadcast signal when it is launched; (2) carry the digital broadcast signal once a specified percentage of households in the broadcaster's coverage area (typically 5%) have equipment capable of receiving a digital signal; (3) carry the digital feed of a broadcaster if the digital feed of

another broadcaster in the same DMA is carried; or (4) negotiate in good faith for carriage once the digital broadcast signal is launched. Moreover, MediaOne plans to enter into discussions with other broadcasters regarding digital carriage,[1] and believes that other cable operators also plan to engage in such discussions.[2]

The sheer number of retransmission consent agreements that already contain digital carriage provisions and the fact that these provisions were negotiated as far back as five years ago make clear that the marketplace is working in this area. Given the significant progress of these negotiations, the Commission should not now attempt to step in and resolve the complicated issues inherent in digital must carry. Not only are cable operators and broadcasters in a better position to identify the key issues and weigh the costs and benefits of resolving those issues, but they can do so in a time frame that makes sense. In other words, as broadcasters roll out digital programming, cable operators and broadcasters can negotiate and resolve carriage issues. As

---

[1] MediaOne supports the Notice's statement that commercial stations that do not enforce their retransmission consent rights and noncommercial stations, which do not have such rights, may enter into voluntary carriage negotiations with cable operators, and would be similarly situated with competing cable programming services. See Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking, CS Dkt. No. 98-120, FCC 98-153, at ¶ 50 ("Notice"). MediaOne also supports the Commission's proposal that parties should be able to negotiate for partial carriage of a broadcaster's digital feed. See id. at ¶ 35.

[2] See, e.g., "Peace in Our Time?," Multichannel News, July 27, 1998, at 1 (noting statement by president of Tele-Communications Inc. that he "expects some form of cooperation between cable and broadcasters" on HDTV "shortly" and reporting that talks between TCI and "all four broadcast networks -- ABC, CBS, NBC and Fox -- are progressing well."). See also "Digital-Carriage Dance," Multichannel News, July 13, 1998, at 1 (reporting statement of ABC Inc. president Robert Iger that digital must-carry rights for ABC stations are unnecessary).

each of these negotiations unfolds, the parties will gain valuable experience with digital, and this will facilitate a rational and, ultimately, a less disruptive transition to digital.

MediaOne believes that such a negotiated approach to digital carriage will work. In fact, MediaOne's own successful negotiations described above -- negotiations that were voluntarily undertaken -- are evidence that it already is working. At any rate, there is no evidence at this time that negotiations will not work and, therefore, no reason for the Commission to rush to judgment, based on essentially no experience, about how the digital transition should be managed.

2. Industry Groups Already Are Resolving Standards And Technical Issues.

While there are many technical issues that need to be resolved to ensure efficient cable retransmission of digital broadcast signals, industry efforts are well on their way to resolving these issues.

a) IEEE-1394 Digital Interface Standard

For example, an industry group is working diligently to meet Chairman Kennard's deadline to establish an IEEE-1394 digital interface standard by November 1, 1998 in order to ensure compatibility between cable digital customer terminals and digital TVs. The president of the National Cable Television Association ("NCTA") recently informed Chairman Kennard that the cable and consumer electronics industries should have "no problem completing" the IEEE-1394 specification by the November 1 deadline.[3] The president of the Consumer Electronics

---

[3] See August 26, 1998 letter from Decker Anstrom, NCTA President to Commissioner Kennard. See also Leslie Ellis, "Prodded by Kennard, CEMA, Cable Near 'Fire-Wire' Spec.," Multichannel News, August 31, 1998, at 47 (discussing progress on digital interface standards and cable industry efforts to develop the "Home Digital Network Interface" ("HDNI")).

Manufacturers Association ("CEMA") recently issued a similar statement indicating that CEMA is "working aggressively" to complete the standard for the "fire wire" digital interface by November.[4] CEMA has also organized a committee to complete the standard-setting process and has already published voluntary standards for alternative interfaces including "RF Remodulator (EIA-762)" and "component video (EIA-770)," and is working to finalize a standard, EIA-679, for a "National Renewable Security Standard" ("NRSS").[5]

b) Standards For Digital Channel Positioning

Industry standards-setting efforts regarding digital channel positioning are also moving forward. Digital broadcasters and cable systems will use different numbering schemes to identify a programming stream. The cable industry is working to develop appropriate mapping and interface specifications. MediaOne agrees with the Commission that these efforts will be successful and that, indeed, "the advent of advanced programming retrieval systems . . . [will allow subscribers] to locate a television station with little degree of difficulty."[6] MediaOne believes that solutions such as the Program and System Information Protocol ("PSIP"), arrived at through voluntary industry standards-setting processes, will address any channel positioning concerns.

---

[4] See "CEMA Promises Decisions By Nov. 1 on 'Fire Wire' Interface," Communications Daily, September 11, 1998, at 5.

[5] Id. at 6.

[6] Notice at ¶ 80.

c) Standards For Digital Modulation

Digital modulation is another example of a complex technical issue that has been partially resolved by the marketplace and probably will be completely resolved in the near future. Because digital radio frequency ("RF") modulation schemes are optimized for particular transmission and distribution media (e.g., terrestrial broadcast, satellite, and cable systems), the actual capacity available for program transmission using a given amount of RF spectrum varies based on the modulation scheme used by a particular system. Broadcasters have elected to use vestigial sideband modulation (8 "VSB"), which allows a 19 Mbps (i.e., 1080i format) digital signal to be transmitted using 6 MHz of spectrum.[7] Digital cable systems use a different modulation scheme -- quadrature amplitude modulation ("QAM") -- which is optimized for hybrid fiber-coax ("HFC") systems and services.[8] VSB and QAM are essentially the digital envelopes into which content is packed before transmitting the content to the viewer.

Broadcasters and cable operators selected VSB and QAM, respectively, because each works more efficiently within their particular networks.[9] VSB does not work efficiently for cable because it was not designed, or optimized, for a wired environment. Thus, MediaOne plans to carry digital video signals using 64 QAM modulation and, in some cases, 256 QAM. Currently, MediaOne uses QAM modulation to deliver other, non-video digital services over its cable

---

[7] For a variety of technical reasons, 8 VSB was accepted by the broadcasting community as an appropriate technical standard optimized for terrestrial broadcast of DTV signals. See id. at ¶¶ 18-23.

[8] Id. at ¶ 22.

[9] For the same reasons, satellite providers, such as DirecTV, use QPSK digital modulation because this is the optimal method for satellite transmission.

systems, such as high-speed data services which MediaOne will be offering to approximately 2.5 million homes by the end of 1998.

If digital broadcast signals are carried over the cable system in QAM envelopes as opposed to VSB envelopes, then cable can place more than a single digital broadcast signal into a single 6 MHz band of spectrum, thereby increasing the efficient use of cable spectrum and reducing the possibility that other cable services will have to be dropped to make room for the new digital broadcast services. 64 QAM is nearly 50% more efficient for cable distribution than 8 VSB. The net digital payload capacities that can be derived from 6 MHz of cable spectrum using the 8 VSB, 64 QAM, and 256 QAM modulation techniques are 19 Mbps, 28 Mbps, and 38 Mbps, respectively. Thus, it only makes sense that cable operators prefer to remodulate digital signals using QAM, rather than VSB, in order to achieve maximum transmission efficiencies over the cable network.[10]

Moreover, not only is QAM more efficient, but any RF modulation format conversion from VSB to QAM is totally transparent to broadcasters' underlying digital video content (including transmission of enhanced program information, such as baseball scores). The conversion from VSB to QAM causes no degradation of broadcast digital video quality; rather, the same digital signal quality which broadcasters deliver to the cable headend will be received by cable subscribers with digital television receivers.

---

[10] See Notice at ¶¶ 64-66. MediaOne's Los Angeles system provides a good example of the potential problem. If must carry were afforded to all 19 digital broadcast stations in this market and the cable operator were required to deliver these signals in VSB format, these broadcasters would take up 114 MHz (or 57%) of the 200 MHz portion of a 750 MHz system reserved for all digital services.

Thus, Commission involvement in this modulation issue is not required because the marketplace already has established the optimal solution, i.e., cable's QAM standard can deliver digital broadcast signals to consumers in the same video format and resolution that originated from the broadcaster's transmitter, while at the same time maintaining the efficient use of the cable system's spectrum.

* * *

In short, industry efforts are already underway in the cable-broadcast negotiations and standards-setting arenas that will go a long way toward resolving the technical, consumer, cost, and other issues raised in the Notice. Therefore, there is no reason for the Commission to adopt any rules in this area.

B. Digital Television Is A Nascent Service That Is Evolving In An Extraordinarily Complex And Dynamic Marketplace, An Environment That Is Particularly Ill-Suited To Regulation Or Government-Imposed Standards.

In addition to being unnecessary for all the reasons described above, Commission intervention into the digital transition is premature at this time given the highly complex and dynamic nature of the digital video marketplace. As the Commission and other observers have often noted, government regulation and government-prescribed technical standards are particularly damaging when imposed upon industries undergoing a high level of technological change, or where technology is at a nascent stage of development. Digital television has both characteristics -- it is an infant technology and is evolving in an extraordinarily complex and dynamic marketplace. Thus, even assuming the Commission had the requisite authority to impose digital must-carry requirements (which, as shown below, it does not), it would be premature to do so. This is especially true given that, as described above, the industries already are well on their way to resolving the issues raised in the Notice.

1. Description Of The Complexity And Highly Dynamic Nature Of Digital Broadband Networks.

Implementation of interactive broadband digital networks is an extremely complex undertaking. The digital customer terminal is a highly sophisticated network computer that contains intricate circuitry and which must seamlessly integrate the software and hardware technologies of a multitude of vendors in order to deliver interactive video, data, telephony, and other services to consumers. The level of technological sophistication required to integrate these digital terminals into cable systems, and cable systems into the Internet and elsewhere, is significant. An infrastructure comprised of computer servers, routers, cables, and gateways to other services must be assembled and coordinated by the cable operator before digital services can be made available to consumers. These sophisticated networks are costly to build and require sophisticated planning, design, and coordination to achieve success.

The broadcasters' digital networks also are complex. And given the unique characteristics of the two media, the integration of digital broadcast signals into digital streams of cable programming means that there is no single solution to the myriad of technical challenges.[11] The Commission has correctly recognized this complexity:

> As the transition to digital occurs, a significant level of complexity will arise due to the different time schedules followed by the nearly 1,600

---

[11] An assessment made in 1995 still rings true today: "Although it is regularly reported in the business press that a 'convergence' of telecommunications technologies is occurring, it may actually be the case that a divergence of such technologies is taking place in the sense that a number of alternative architectures may simultaneously evolve for the delivery of various combinations of narrowband and interactive broadband services." Robert W. Crandall and J. Gregory Sidak, "Competition and Regulatory Policy for Interactive Broadband Networks," 68 S. Cal. L. Rev. 1203, 1204 (Jul. 1995).

> television licensees and the approximately 11,000 U.S. cable systems with respect to the implementation of digital transmissions.[12]

The complexities with digital do not end with the network and the technology itself. There are equally challenging issues in other areas, such as marketing, consumer demand, billing, and advertising. What digital services will consumers most highly demand? Will consumers prefer HDTV or multiplexed SDTV? How will advertising and customer billing change in a world where digital technology allows the creation of highly targeted niche programming services, and where two-way networks facilitate consumer interaction with programming and advertising content? These and other difficult questions will only be answered over time as digital services are rolled out to a broader audience.

Moreover, the interactive digital broadband networks that MediaOne and others are building are not only complex, they are highly dynamic. In this new world, technological changes are rapid and constant. For example, the original HDTV system was an analog system, developed by a consortium of Japanese companies, called MUSE. The United States was on the brink of adopting this analog technology, but then a technological breakthrough made it possible for the current and far superior digital HDTV system to emerge. In this regard, the convergence of versatile computer technology into digital customer terminals and broadband networks further accelerates the pace of change and the level of technological dynamism. Even companies considered to be the technology leaders must adapt to these changes. Recently, the CEO of

---

[12] Notice at ¶ 9. See also Remarks of William E. Kennard before the International Radio and Television Society, New York, N.Y. (Sept. 15, 1998), at 3 ("The roll-out of DTV... involves many industries. Broadcast. Cable. Consumer electronics. Computer. Entertainment. Let's not kid ourselves. The rollout of DTV is more complex in many ways than the rollout of analog.").

CISCO Systems, Inc., a premier supplier of end-to-end network equipment, noted that the market was moving so rapidly that he believed

> you have to change your company every two years. [CISCO does not] plan financially beyond three years. The market moves so rapidly, we found our projections to be of little value.[13]

The Commission has recognized that integrating these industries, with their different and evolving technologies, presents a unique and difficult challenge:

> How the multiple technical systems will function in a digital environment remains to be seen. We note that the various technical elements involved in digital broadcast signal carriage are constantly in flux as technology advances.[14]

As shown below, it necessarily follows from this conclusion that it would be premature for the Commission to impose a transitional digital must-carry requirement.

2. Given This Highly Complex And Dynamic Environment, The Commission Should Rely On The Marketplace To Resolve Difficult Technical, Economic, Consumer Choice, And Other Issues In The Transition To Digital.

Given the highly complex and dynamic conditions described above, there is a substantial chance that government intervention at this critical point would freeze the current level of technology and stifle the development of new technologies. Stated another way, because technology is in such a state of flux, there is insufficient information for the Commission to regulate digital video as contemplated by the Notice.[15] Premature government intervention would

---

13 See Richard Brandt interviewing John Chambers, Upside (Oct. 1998) at pp. 124, 126.

14 Notice at ¶ 18.

15 One analyst refers to this as the "Blind Giant Quandary." See P.A. David, "Some New Standards for the Economics of Standardization in the Information Age," in P. Dasgupta and P.

(footnote continued...)

stymie the experimentation -- both by manufacturers and developers, as well as consumers -- which leads to improved information about the advantages of various technological alternatives. In MediaOne's view, the Commission's principal role at this time should be to observe the marketplace, not to dictate its terms. As one observer put it, one of the "positive actions" a government agency can pursue "is to gather more information about technological opportunities even at the cost of immediate losses in operations efficiency."[16]

These economic realities have long been recognized by both the Commission and industry analysts. For example, Drs. Stanley M. Besen and Leland L. Johnson, two prominent economists, have long argued that, when an industry is in a period of high innovation and volatility, the likelihood that government intervention will result in inefficient and/or artificial decisions is particularly acute.[17] Thus, government regulation during the fast-paced development of any burgeoning industry -- including the digital video industry -- should be avoided. Only after the technology "settles down" can any possible benefits of regulation become apparent. As Besen and Johnson conclude:

> [T]he government should refrain from attempting to mandate or evaluate standards when the technologies themselves are subject to rapid change. A

(... footnote continued)

Stoneman (editors), Economic Policy and Technological Performance, Cambridge: Cambridge University Press, 1987, p. 230. The Quandary is "the dilemma posed by the fact that public agencies are likely to be at their most powerful in exercising influence upon the future trajectory of a network technology just when they know least about what should be done." Id.

16 Id.

17 See Stanley M. Besen and Leland L. Johnson, Compatibility Standards, Competition, and Innovation in the Broadcasting Industry, Rand Corporation, November 1986, at 94 ("the dangers of premature standard-setting are especially great if significant refinements are taking place.").

> major reason for the Commission's difficulty in establishing the first color television standard was the fact that competing technologies were undergoing rapid change even during the Commission's deliberations. It is only after the technologies have "settled down" that government action is most likely to be fruitful, as illustrated in the TV stereo.[18]

Rather than regulate digital television at this early stage, the Commission should encourage the marketplace to work through any initial "glitches." Other analysts of information technology and digital communications have reached the same conclusion. Consider, for example, the following statements:

- "[G]overnment is ill-equipped to regulate tightly a fast-paced environment characterized by rapid technological change and continuous innovation in services. If it tries, its efforts will almost certainly backfire."[19]

- "[S]etting standards too early in the development of the information marketplace would lock us into technologies which ultimately will retard the efficient evolution and use of these networks."[20]

The development of the personal computer ("PC") industry demonstrates the benefits of letting the marketplace work first. During the past decade, the American PC industry has dominated the worldwide market. Market forces have successfully generated the necessary de facto standards required to achieve compatibility while not impeding innovation. The Commission wisely encouraged this growth by refraining from imposing technical standards or

---

[18] Id. at 135. See also EIA and TIA White Paper on National Information Infrastructure, 1994, at 9 ("In areas of rapidly changing technology, premature adoption of a standard can impede innovation.").

[19] Peter Pitsch & David C. Murray, "A New Vision for Digital Telecommunications," A Briefing Paper, No. 171, The Competitiveness Center of the Hudson Institute, Indianapolis, IN, Dec. 1994, at 2.

[20] The Information Marketplace: The Perspective of the Software and Computer Industry, Special Focus Paper, Spring 1995, at 11.

otherwise regulating the PC industry. The Administration and the Commission have recognized that a similar approach makes sense in the fast-paced world of the Internet.[21]

Likewise, the Commission adopted a market-based approach in the licensing of PCS spectrum, concluding that the rapid technological change in PCS development demanded such a flexible regulatory approach:

> [M]ost parties recognize that PCS is at a nascent stage in its development and that imposition of a rigid technical framework at this time may stifle the introduction of important new technology. We agree, and find that the flexible approach toward PCS standards that we are adopting is the most appropriate approach.[22]

This decision fostered vigorous innovation and competition among vying PCS transmission schemes.[23] The Commission should encourage such innovation and competition with digital television as well. Chairman Kennard already has recognized this point:

---

[21] The Clinton Administration has developed, with input from the Commission, a strategy for Internet development which contemplates that industry, not government, must lead, and concludes that "[i]nnovation, expanded services, broader participation, and lower prices will arise in a market-driven arena, not in an environment that operates as a regulated industry." See A Framework for Global Electronic Commerce, July 1, 1997 at 2. The Commission has expressed similar statements regarding the need to forbear and rely heavily on the marketplace in this area. See, e.g., Kevin Werbach, "Digital Tornado: The Internet and Telecommunications policy," OPP Working paper Series, March 1997, at 29 ("The Commission can and should greatly limit the extent to which its actions interfere with the functioning of the Internet services market."); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Notice of Inquiry in CC 98-146, FCC 98-187 (rel. Aug. 7, 1998), at ¶ 5 ("We intend to rely as much as possible on free markets and private enterprise to deploy advanced services.").

[22] See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd 7700, at ¶ 137 (1993).

[23] See, e.g., "CDMA Wins Major Backer in Bells' PCS Primeco," Multichannel News, at 1A (June 12, 1995).

> [T]he pace of the [digital] transition will be set by the private sector. And we in government should not set up the industry for failure by creating false expectations or, worse, micromanaging what you should do with this promising technology. ... The role of government is not to supply the business plan for digital TV. Or to put artificial limits on the industry's business plans.[24]

A market-based approach to resolving the issues in the digital transition is especially warranted given that at this time nobody can credibly articulate the impact of digital must carry on consumers.[25] For example, how will digital must carry impact consumer viewing preferences? How will it affect consumers' TV purchases? There simply is no experience base that would enable the Commission to answer these questions. The Commission had over a quarter century of experience with analog television before it decided to impose analog must carry on cable operators. It has not yet had five minutes worth of experience with digital television.[26]

---

[24] Remarks of William E. Kennard before the International Radio and Television Society, New York, N.Y. (Sept. 15, 1998), at 3.

[25] See Statement of Commissioner Michael K. Powell before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, June 10, 1998, available in LEXIS, 1998 FCC LEXIS 2764 ("We cannot possibly predict accurately the direction and impact of fast changing technology, nor are we able to guess correctly whether or not consumers will embrace one technology over another.").

[26] See Notice at ¶ 68 ("Picture and sound quality issues in a digital environment implicate standards and measurement techniques that are quite different than those that arise in the analog environment.... We tentatively conclude that it would be premature to attempt to replicate parallel digital standards before digital broadcasting has even commenced.").

C. The Imposition Of Digital Must Carry Is Particularly Unjustified Because It Would Ignore Consumer Preferences And Reduce Program Diversity And Quality Simply To Afford Undeserved Preferential Treatment To Broadcasters' Digital Feeds.

1. Transitional Digital Must Carry Would Ignore Consumer Preferences and Reduce Program Diversity And Quality.

MediaOne and other cable operators program their cable systems to respond to customer preferences and demands. Digital must carry, by elevating broadcasters to "preferred" status with guaranteed access to cable capacity, would limit operators' ability to add new and diverse, niche programming that consumers really desire.[27] While this problem is inherent in must carry regulations generally, it would be particularly acute during the transition period if two signals per broadcaster were afforded such preferred status. During the transition period, for example, a channel-locked cable system would be forced to drop an existing non-broadcast program service for each digital broadcast signal it is required to carry, even if the customers of the system would prefer that the existing services be retained.

A digital must-carry rule also would reduce program diversity and program quality. The reduction in diversity would occur because most broadcasters have announced their intention to simulcast their analog programming on their digital channel[28] and, in fact, the Commission's rules

---

[27] Niche services are highly valued by cable customers. For example, in the second quarter of 1998, The Comedy Channel increased primetime viewership by 75%, The Family Channel by 30%, fX by 33% and The Food Network and The Travel Channel each by 50%. See "Cable Sizzles in 2nd Qtr, With 12% Ratings Gain," Multichannel News, June 29, 1998, at 8.

[28] NBC, for example, has indicated that it will simulcast analog programming on its digital feed because "'[w]e don't have enormous surpluses of library materials that are going to make those other channels all that exciting.'" See "Broadcasters Biting the Bullet on Digital Format Decisions," Media Daily, at No. 5, Vol. 4 (Apr. 6, 1998). A CBS Vice President has said that computer enhancement techniques will be used to convert NTSC programs to simulate high definition programming.

(footnote continued...)

require simulcasting.[29] Thus, during the transition, consumers will be denied innovative services in favor of duplicative broadcast content. Similarly, a transitional digital must-carry rule could result in consumers being denied better quality services. For example, if cable operators are forced to carry digital broadcast signals, then they may not have sufficient capacity to carry a non-broadcast programmer's service even if it is superior in quality. In effect, digital must carry ignores program diversity and quality in order to extend further the marketplace advantage broadcasters already enjoy with analog must carry.

Finally, given that digital TVs are expected to cost about $7,000-$10,000 initially,[30] consumer preferences would be ignored and program quality and diversity would be diminished so that a handful of upscale consumers can watch largely duplicative broadcast programming on their new expensive TVs. That is an outrageous and clearly anti-consumer public policy result.

(... footnote continued)

According to Robert Seidel, "When [CBS does not] have true HD, we'll be upconverting the NTSC programming." Communications Daily, at No. 180, Vol. 18 (Sept. 17, 1998), at 7. See also Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act, Order on Reconsideration, MM Dkt. No. 95-176, FCC 98-236 (rel. Oct. 2, 1998), at ¶ 27 ("It seems likely that almost all of the programming content that becomes available in the early years of the transition to digital video reception will also be available in analog form ....").

[29] 47 C.F.R. § 73.624(f) (requiring broadcasters to "simulcast," i.e., to "duplicate," their programming on their analog and digital channels from 2003 until the analog channel is returned to the government).

[30] See Paul Farhi, "Four Area TV Stations to Offer Digital Broadcasts," Washington Post, October 7, 1998, at C11; J. Brinkley, "HDTV: High Definition, High in Price," New York Times, Section G, p. 1 (Aug. 20, 1998); R. Tedesco & G. Dickson, "HDTVs: One (Big) Size Will Fit All," Broadcasting & Cable, at 42 (Mar. 9, 1998).

2. Expanded Channel Capacity Achieved Through System Upgrades Provides No Basis For Affording Preferred Status To Broadcasters' Digital Feeds During The Transition Period.

MediaOne has been an industry leader in the rebuilding and upgrading of cable systems. By the end of 1999, MediaOne will have invested approximately $5.6 billion to upgrade and rebuild its broadband infrastructure.

Some parties have suggested that such system upgrades and expanded channel capacity provide the answer to digital must carry. They assert that since upgraded cable systems have spare channel capacity, there is no problem with requiring them to occupy those spare slots with digital broadcast services.[31]

This argument is without merit for several reasons. In all cases, system upgrades are undertaken to accommodate new services that consumers have requested. There are about 172 national satellite-delivered cable programming services[32] (and many other regional and local cable programming services), many of which are not currently carried on MediaOne systems due, in part, to capacity constraints. As systems are upgraded, MediaOne adds many of these services to the systems' channel lineup. In addition, MediaOne may add new premium services, multiplexed versions of existing premium services, multiple channels of pay-per-view, and digital music

---

[31] See, e.g., Testimony of Elizabeth Murphy Burns, Association for Maximum Service Television, before the Senate Commerce, Science and Transportation Committee, July 8, 1998, at 9 ("As cable upgrades, there is no reason that broadcast DTV should not be among the new programming the systems carry."). See also Notice at ¶ 45 (seeking comment on whether digital must carry should be imposed during the transition period only on those systems that have expanded their channel capacity through a system upgrade).

[32] 1997 Video Competition Report, 13 FCC Rcd 1304, at Tables F-3 and F-4 (1998).

services, as well as high-speed data services, Internet connectivity, and the delivery of competitive telephony services.[33] These new video and non-video services take up a substantial portion of the expanded capacity that results from system upgrades.[34]

In short, while system upgrades do expand channel capacity, it is overly simplistic to conclude that a digital must-carry obligation would not impose serious constraints on upgraded systems. To the contrary, even in upgraded systems, such an obligation would deprive consumers of innovative and diverse video and non-video services they highly desire. This result is especially unjustifiable in light of the fact that, as noted, transitional digital must carry would substitute for these services largely duplicative broadcast programming that can only be received by a handful of high-income consumers with expensive digital TVs.

Moreover, even if a cable system has "reserved" a segment of the new capacity for services in development, this does not mean that a transitional digital must-carry requirement in such a system is justified. Cable operators have invested and continue to invest billions of dollars in system upgrades based on the expectation that they will have the flexibility to program this new capacity with the services that are most highly demanded by the broadest group of their customers. If, instead, the Commission adopts a requirement that the operator give spectrum to

---

[33] For example, by the end of 1998, MediaOne will be offering its content-rich, high-speed cable Internet service, MediaOne Express, to approximately 2.5 million homes and will be offering its "Digital Telephone Service" to approximately 1 million homes. Also, MediaOne recently launched its Digital Telephone Service to 300,000 customers in Boston at rates up to 47% lower than those of its telco competitors.

[34] MediaOne notes in this regard that DBS operators do not appear to be having any problems filling 220 plus channels of digital capacity with quality non-broadcast services that their subscribers desire.

local broadcasters for delivery of their digital services, it would deprive consumers of the services they desire.[35]

In this regard, Chairman Kennard recently questioned whether there is any basis for believing that broadcasters deserve preferred status:

> Broadcasters want the government to extend their right to cable carriage to new digital channels, asserting they bring a unique, free public service to America. As cable operators create local programming, particularly news and public affairs shows, and with almost three quarters of Americans actually paying to receive those channels, what remains that makes broadcasters unique? And is this uniqueness significantly tangible, demonstrable, and assured to justify requiring cable carriage?[36]

The broadcasters already have been guaranteed carriage of one service -- their analog channel. There is simply no legal or policy basis for the Commission to accord broadcasters yet another guarantee that their second, digital channel will be simultaneously carried on cable systems, particularly given that, as shown above, such forced carriage would cause significant harm to consumers, cable operators, and cable programmers.

* * *

For the foregoing reasons, a transitional digital must-carry requirement is unnecessary, premature, and would ignore consumer preferences, program diversity, and program quality. Accordingly, the Commission should not impose such a requirement on cable operators. Of

---

[35] It would also deter cable operators from upgrading their systems (or affect the pace at which upgrades occur). Stated another way, operators' incentives to invest in system expansions will be reduced if they know that a direct result of that investment will be an automatic give away of a significant portion of the expanded channel capacity to broadcasters' digital feeds.

[36] See Remarks of William E. Kennard, Chairman, Federal Communications Commission, The International Radio and Television Society, New York, NY (September 15, 1998), at 4.

course, Commission regulation in this area at any point would only be justified if the Commission has the statutory and constitutional authority to support such regulation. But as shown in the next two sections, the Commission is without such statutory and constitutional authority during the transition period when broadcasters will be transmitting both analog and digital signals.

III. THE COMMISSION LACKS STATUTORY AUTHORITY TO IMPOSE DIGITAL MUST-CARRY REQUIREMENTS ON CABLE OPERATORS DURING THE TRANSITION PERIOD.

A. At Most, Section 614(b)(4)(B) Allows The Commission To Adopt Changes To Its Must-Carry Rules To Ensure That The Signal Quality Of Broadcast Transmissions Is Maintained After The Transition To Digital Is Complete.

Imposing any digital must-carry obligation on cable operators before the broadcasters return their analog spectrum is inconsistent with both the plain language of Section 614(b)(4)(B) and its underlying purposes. The statutory provision states:

> (4) SIGNAL QUALITY.--
>
> (B) ADVANCED TELEVISION.--At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.[37]

The phrase "such broadcast signals" refers back to "television broadcast signals," which can refer only to the analog service in existence at the time of enactment. Moreover, the phrase "have been changed" indicates that Congress intended the Commission to alter its must-carry rules, if necessary, only after the television station's analog signal has ceased broadcasting and the station's

---

[37] 47 U.S.C. § 534(b)(4)(B) (emphasis added).

digital signal has replaced it as the broadcaster's sole over-the-air service. In short, the plain language of Section 614(b)(4)(B) reveals Congress' intent to ensure retransmission of a high-quality signal by cable operators after completion of the conversion by broadcasters to an advanced television format, rather than an intent to expand the carriage requirement to include an additional digital broadcast signal during the transition period.[38]

The legislative history of the 1992 Cable Act confirms Congress' preoccupation with signal quality after the transition. Congress envisioned that the advanced television format would deliver improved picture quality[39] and therefore required the Commission to "initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals."[40]

B. Mandatory Carriage Of Both A Broadcaster's Analog And Digital Broadcast Signals During The Transition Period Is Precluded By The Act's Non-Duplication Provisions In Section 614(b)(5).

There are two independent non-duplication provisions in Section 614(b)(5) which prohibit the Commission from imposing a digital must-carry requirement during the transition period --

---

38 The conclusion that Congress' intent was to maintain acceptable signal quality after completion of the conversion to digital is further supported by the fact that Section 614(b)(4)(B) is contained in a section of the Act entitled "Signal Quality."

39 See H.R. Rep. 628, 102d Cong., 2d Sess. 94 (1992) ("1992 Cable Act House Report"). Congress clearly understood the advantages of high definition television, recognizing picture clarity and signal quality as one of the biggest benefits. See, e.g., 138 Cong. Rec. S675 (daily ed. Jan. 30, 1992) (statement of Sen. Kerry) ("While all of this is happening, the terrestrial broadcasters are making advances. High definition television is right around the corner. Once it is developed, conventional signals are going to have phenomenally better clarity.").

40 1992 Cable Act House Report at 94.

namely, the "substantial duplication" and the "network affiliate duplication" prohibitions. These independent prohibitions are discussed in turn below.

1. The "Substantial Duplication" Prohibition Precludes The Imposition Of Digital Must Carry During The Transition Period.

Cable operators may not be required to "carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its system."[41] This provision reflects a balance between an operator's editorial discretion to select programming and Congress' goal to increase the diversity of local voices by requiring carriage of local broadcast television stations. In enacting the must-carry requirement in the 1992 Cable Act, Congress noted that:

> [i]f there are duplicate qualified signals, the cable operator is not obligated to carry more than one since carriage of duplicate signals would do nothing to increase the diversity of local voices.[42]

Congress defined "substantially duplicates" as the "simultaneous transmission of identical programming on two stations [which] constitutes a majority of the programming on each

---

[41] 47 U.S.C. § 534(b)(5) (emphasis added). Similar nonduplication restrictions apply in the case of noncommercial educational broadcast television stations. See 47 U.S.C. § 535(e).

[42] 1992 Cable Act House Report at 66. The Commission's rules implementing this provision provide that a cable operator:

> is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station that is carried on its cable system ....

47 C.F.R. § 76.56(b)(5). The Commission found that this rule reflects congressional intent that subscribers receive the signal "most likely to be responsive to their local needs and interests." See In Re Implementation of the Cable Television and Consumer Protection and Competition Act of 1992, Report and Order, 8 FCC Rcd 2965, at ¶ 59 (1993) (quoting 1992 Cable Act House Report at 92) ("1993 Must Carry Order").

station."[43] The statutory "substantial duplication" prohibition would be violated if the Commission requires cable operators to carry both a broadcaster's analog and digital feeds during the transition period. This is especially true given that many broadcasters have indicated their intention to carry duplicative programming on their digital channel.[44]

Moreover, the Commission already has required broadcasters to "simulcast," i.e., to "duplicate," their programming on their analog and digital channels from 2003 until the analog channel is returned to the government.[45] Since the statute expressly precludes mandatory carriage of duplicative content by cable operators and since the Commission's simulcast rule, by definition, requires simultaneous broadcast of duplicative content, must carry of both the analog and digital signals during the transition period is prohibited by the plain language of Section 614(b)(5).[46]

---

[43] 1993 Must Carry Order at ¶ 60 (citing 1992 Cable Act House Report at 94). The Commission's rules state that "substantially duplicates" means that "a station regularly simultaneously broadcasts the identical programming as another station for more than 50 percent of the broadcast week." 47 C.F.R. § 76.56(b)(5).

[44] See n. 28, supra.

[45] 47 C.F.R. § 73.624(f). Also, while the simulcast requirement begins in 2003, the Commission has required all broadcasters to provide at least one free video programming service on its digital capacity from the outset. See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Fifth Report and Order, 12 FCC Rcd 12804, at ¶ 28 (1997). Since many broadcasters likely will satisfy this requirement through a simulcast of their analog feed, the duplication of content on broadcasters' analog and digital feeds will commence well before 2003.

[46] The Commission has previously acknowledged that a simulcast requirement that would result in "carrying duplicative programming" on both the digital and analog channel would mean that both stations need not be carried. See In Re Advanced Television Systems, Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, 10 FCC Rcd 10540, at ¶ 82 (1995). Moreover, if the Commission were to impose must-carry obligations on cable operators for both digital and analog signals during the transition period, the Commission would be doing little to further Congress' goal of increasing diversity of local voices, in large part because broadcasters would be doing nothing more than simulcasting their programming.

a) The Commission Cannot Avoid The Substantial Duplication Prohibition By Focusing On The Different Format Of Analog And Digital Signals.

The Commission cannot avoid the substantial duplication prohibition by claiming, as suggested in the Notice, that because they use different transmission formats, broadcasters' analog and digital signals could be considered non-duplicative even if they contain identical programming content.

As noted, Congress clearly indicated that "[t]he term 'substantially duplicates' is intended to refer to the simultaneous transmission of identical programming on two stations which are eligible to assert signal carriage protections under this section, and which constitutes a majority of the programming on each station."[47] Thus, Congress' intent in adopting this provision was to ensure that a cable operator was not required to sacrifice valuable channel capacity if substantially the same content was carried on two different signals subject to the must-carry requirement. The Commission cannot modify Congress' definition of "substantial duplication" to mean that programming transmitted in digital is not duplicative of analog programming where the signals contain identical (or substantially similar) program content. Such a revised definition would be squarely at odds with Congress' clear content-based focus.[48]

---

[47] See 1992 Cable Act House Report at 94 (emphasis added). The Commission looked to this legislative history in upholding its definition of "substantial duplication" in the must-carry proceeding, observing that its definition of substantial duplication is "consistent with the legislative history...." See In Re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd 6723, at ¶ 38 (1994) ("Must Carry Reconsideration Order").

[48] The Commission has found that where the same program is simultaneously transmitted in Spanish by one broadcaster and English by another broadcaster, the substantial duplication provision is not implicated. See 1993 Must Carry Order at ¶ 21. However, this Commission determination provides no basis for finding that a broadcaster's analog and digital feeds carrying identical content are

(footnote continued...)

b) Nor Can The Commission Avoid The Substantial Duplication Prohibition By Suggesting That The Prohibition Only Applies When There Are Two Separate Television Broadcast Stations Involved.

The Commission cannot claim that Congress intended the "substantial duplication" provision to apply only where two different television broadcast stations transmit substantially duplicative programming.[49] The whole point of the non-duplication provision is to prevent a cable operator from having to devote two channels to substantially the same programming, thereby reducing the diversity of programming which the operator can offer subscribers. The effect of the duplication on program diversity is not at all dependent on whether one or two broadcast stations are involved. Thus, Congress' mandate that cable operators not be required to carry substantially duplicative programming applies equally whether such programming is transmitted by two separate stations, or a single station with two separate feeds. The fact that the statute speaks of duplication by "another" television broadcast station is simply a reflection of the fact that at the time Congress wrote these words each television station transmitted a single

---

(... footnote continued)

non-duplicative for purposes of Section 614(b)(5). To a Spanish-speaking person who does not understand English, the English broadcast of the same program is the equivalent of different programming content. By contrast, any consumer who receives the same content on his or her digital TV (or on his or her analog TV with the help of a digital converter box) in both analog and digital formats would have no problem understanding the content on either channel, so that to all viewers the programming would be the same, and hence duplicative.

[49] See Notice at ¶ 70.

signal; it does not "suggest" that "the signals in question must come from two different stations, not the same one," in order to trigger the non-duplication prohibition.[50]

2. The "Network Affiliate Duplication" Prohibition Also Precludes Imposition Of Digital Must Carry During The Transition Period.

Separate and apart from the "substantial duplication" provision discussed above, a second provision in Section 614(b)(5) prohibits the Commission from requiring cable carriage of broadcasters' digital and analog feeds during the transition. This "network affiliate duplication" prohibition provides that:

> a cable operator shall not be required to carry ... the signals of more than one local commercial television station affiliated with a particular broadcast network (as that term is defined by regulation).[51]

Importantly, this provision does not require that any specific percentage of content on the two signals be duplicative for the provision to apply. Rather, the mere fact that two stations are affiliated with the same network triggers the prohibition.

If a television broadcast station is "affiliated" with a broadcast "network," its affiliation will run to both its analog and its digital feeds.[52] In effect, the analog and digital feeds would, by

---

[50] See id. at ¶ 70 (emphasis added). Of course, if the Commission determines that the analog and digital feeds of a single broadcast licensee "constitute separate 'broadcast stations' for purposes of ... digital broadcast signal carriage," see Notice at ¶ 34, then when a licensee's digital and analog feeds carry identical content, the duplication would be coming from "another" station under the literal terms of the Act.

[51] 47 U.S.C. § 534(b)(5). See also 47 C.F.R. § 76.56(b)(5).

[52] The Commission did not confine its definition of "network" to the traditional broadcast television networks (i.e., ABC, CBS, Fox, and NBC), but rather sought "a definition that not only includes entities that traditionally have been considered national television networks, but is also flexible enough to accommodate the changing video marketplace." See 1993 Must Carry Order at ¶ 60. As

(footnote continued...)

definition, constitute two stations affiliated with the same network. As such, Section 614(b)(5) would squarely prohibit a cable operator from being required to carry both of these network affiliate signals. As in the case of the substantial duplication provision discussed above, the fact that the statute speaks of "more than one local commercial television station affiliated with a particular broadcast network" is simply a reflection of the fact that at the time the statute was enacted, each television station transmitted a single signal; it does not suggest that the network affiliate prohibition is only triggered where the two network affiliated signals come from two different broadcast licensees, as opposed to the same broadcast licensee.[53]

(... footnote continued)

such, it defined network as follows: "A commercial television network is an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states." 47 C.F.R. § 76.55(f).

The Commission defined "affiliate" in a similarly broad manner. For example, even without a standard affiliation agreement, the Commission has found a station to be an "affiliate" of a network. See In Re: MediaOne, Inc., Memorandum Opinion and Order, 12 FCC Rcd 12155, at ¶ 33 (1997) ("[We find] no support ... that[,] for purposes of this rule[,] an affiliate is other than a station which broadcasts the output of a television network. Whether that takes place through a conventional affiliation contract, a retransmission consent agreement, a local marketing agreement, or in some other creative fashion would not seem to matter in terms of the specific purposes of the statutory and rule provisions regarding the cable carriage of duplicative networks.").

[53] Also, if the Commission determines that the analog and digital feeds of a single broadcast licensee constitute separate local television stations, see Notice at ¶ 34, then "more than one local commercial television station affiliated with a particular broadcast network" would be involved under the literal terms of the Act. If, on the other hand, the Commission were to consider a broadcaster's digital and analog feeds to constitute a single local television station, the statute would still preclude any requirement that cable operators carry both signals for the reasons described above and because Sections 614(b)(3) and 615(g)(1) require a cable operator to carry only "the primary video ... of each of the local commercial television stations carried on the cable system...." 47 U.S.C. § 534(b)(3), 47 U.S.C. § 535(g)(1) (emphasis added). Stated another way, if the analog and digital feeds are construed to constitute but a single local broadcasting station, the "primary video" statutory provisions would mean that a cable operator's must-carry obligation would be satisfied by carriage of a single video feed of each broadcaster who elects must carry. See Black's Law Dictionary, West Publ. Co. 1991, Abridged 6th ed. at 826 ("Primary" means "First; principal; chief; leading.").

C. Section 614(b)(7)'s Requirement That All Must-Carry Signals Be "Viewable" By All Cable Subscribers Further Illustrates That Mandatory Carriage Of Broadcasters' Digital Signals During The Transition Period Is Inconsistent With Congressional Intent.

Section 614(b)(7) of the Act requires that all must-carry signals must be "provided to every subscriber of a cable system" and "viewable via cable on all television receivers of a subscriber which are connected ... by a cable operator or for which a cable operator provides a connection."[54]

If the Commission were to impose digital must carry during the transition period, Section 614(b)(7) would require all cable subscribers to subscribe to and pay for these new (largely duplicative) signals. Moreover, nearly all of the nation's 65 million cable subscribers (i.e., those who have not purchased expensive digital TVs) would also be required to lease or purchase a set-top device that can translate the broadcaster's digital feed into an NTSC signal that is "viewable" on their analog television receivers, consistent with the statute.[55]

It is far-fetched in the least to believe that when Congress enacted must carry in 1992, it intended all cable subscribers to incur substantial additional costs in order to ensure that all digital

---

[54] See 47 U.S.C. § 534(b)(7) (emphasis added).

[55] The Commission has previously held that it lacks the authority to make an exception to this statutory requirement. For example, the Commission was asked by commenting parties in the analog must-carry proceeding to exempt commercial subscribers, such as hotels and hospitals, from this requirement. However, the Commission found that "[t]he Act does not give the Commission authority to exempt any class of subscribers from this requirement." See 1993 Must Carry Order at ¶ 34 (emphasis added). See also Must Carry Reconsideration Order at ¶ 15 ("Congress made clear its intent that all subscribers have access to local commercial broadcast signals.") (emphasis added); Complaint of WLIG-TV v. Cablevision Systems Corp., DA 93-1365 (rel. Nov. 10, 1993) (ordering the cable operator to move a broadcast station to a lower channel number during a system rebuild so that the station would be "viewable" by all subscribers).

broadcast programming is "viewable" on their TVs, especially when much (if not all) of the programming transmitted via the digital feed will be the exact same programming they already receive via the broadcaster's analog feed.[56]

D. The 1997 Balanced Budget Act And Its Legislative History Do Not Provide The Commission With Authority To Impose Digital Must Carry During The Transition Period.

The legislative history of the 1997 Balanced Budget Act states that Congress, in establishing criteria for the return of analog broadcast spectrum to the government, was "not attempting to define the scope of any MVPD's 'must-carry' obligation for digital television signals."[57] Thus, the 1997 Balanced Budget Act expressly does not confer any independent authority on the Commission to expand cable operators' current must-carry obligation. The legislative history also indicates that the digital must-carry decision is "for the Commission to make at some point in the future."[58] However, Section 624(f) requires that the Commission do so based on existing express authority found somewhere in Title VI the Communications Act,[59] and no such existing express authority can be cited. Further, even assuming the Commission were not

---

[56] On an aggregate basis, this requirement would amount to a multi-billion dollar tax on cable subscribers.

[57] See 143 Cong. Rec. H 6131, H6170 (1997).

[58] Id.

[59] See 47 U.S.C. § 544(f) ("Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter [i.e., Title VI of the Communications Act]." (emphasis added). The legislative history makes it clear that the express limitation on the Commission's authority to regulate the provision or content of cable services found in Section 624(f) was intended to apply in the area of must carry regulations. See 934 H.R. Rep., 98th Cong., 2d Sess. 70 (1984).

precluded by Section 624(f) from looking outside of Title VI for the requisite statutory authority to expand must carry during the transition period, it is beyond reason to assert that one ambiguous sentence, buried in a Balanced Budget Act's legislative history, bestows upon the Commission broad new authority to impose such a transitional digital must-carry requirement.

For the foregoing reasons, MediaOne strongly disagrees with the Commission's tentative conclusion that "Section 614(b)(4)(B) ... and the Balanced Budget Act ... give us broad authority to define the scope of a cable operator's signal carriage requirements during the period of change from analog to digital broadcasting."[60] Particularly when these two provisions are viewed in light of the various other indications of Congress' contrary intent discussed above, as well as the express prohibition in Section 624(f), the Commission simply cannot maintain that it has the statutory authority to impose digital must-carry rules during the transition period.

IV. IMPOSITION OF A DIGITAL MUST-CARRY REQUIREMENT DURING THE TRANSITION PERIOD WOULD BE UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

Even assuming that the Commission had statutory authority to impose digital must carry during the transition period, such a requirement would still contravene the First Amendment. As the Supreme Court held in Turner I, the must-carry provisions of the 1992 Act are subject to intermediate First Amendment scrutiny.[61] Under this standard, such regulations must: (1) further

---

[60] Notice at ¶ 13. See also discussion at 26-27, supra, demonstrating that Section 614(b)(4)(B) also provides the Commission with no authority to impose digital must carry during the transition period.

[61] See Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994) ("Turner I").

an important or substantial governmental interest unrelated to the suppression of free speech;[62] and (2) impose a restriction on First Amendment rights that is no greater than necessary to the furtherance of the governmental interest, i.e., the regulations must be "narrowly tailored." As shown below, the imposition of digital must carry during the transition period cannot satisfy either prong of the intermediate scrutiny standard.

A. The Imposition Of Digital Must Carry During The Transition Period Is Not Necessary To Further An Important Or Substantial Governmental Interest.

The Turner II Court held that Congress' goal underlying analog must carry to preserve free, over-the-air, local broadcasting was an important governmental interest under the intermediate scrutiny standard.[63] The Court further found that there was substantial evidence before Congress supporting its predictive judgment that local broadcasters denied cable carriage would suffer financial harm and possible ruin in the absence of must carry, thereby endangering the entire free, local, over-the-air broadcast system.[64]

However, as shown below, the substantial interest underlying analog must carry that was upheld in Turner II, and the evidence supporting that interest, are not present in the case of transitional digital must-carry rules. Nor are there other important or substantial governmental interests (or substantial evidence to support them) that would justify transitional digital must-carry

---

62 See id. at 662 (citations omitted).

63 See Turner Broadcasting System, Inc. v. Federal Communications Commission, __ U.S. __, 117 S.Ct. 1174, 1186 (1997) ("Turner II"). See also Turner I at 662; Notice at ¶ 5.

64 See Turner II at 1196. See also Notice at ¶ 15.

rules. Therefore, the Commission cannot meet the first prong of the intermediate scrutiny standard.

1. The Imposition Of Digital Must-Carry Rules During The Transition Period Is Not Necessary To Further The Governmental Interest Under Section 614 That Was Upheld In Turner II.

The Commission cannot demonstrate that the imposition of digital must-carry rules during the transition period is necessary to further the important governmental interest established under Section 614 and upheld by the Turner II Court. Specifically, the Commission cannot show that the broadcasting industry would be in jeopardy absent the extension of the must-carry rules to digital broadcast transmissions during the transition period.

The Turner II Court found that the loss of cable carriage in the analog context threatened to decrease broadcasters' ratings and, ultimately, their advertising revenues and financial stability.[65] By contrast, there will be no time during the transition period when a broadcaster's analog signal will not be carried by a cable operator. Broadcasters retain the right to transmit their analog signals, which are eligible for must carry, through the entire digital transition period, which is currently scheduled to end December 31, 2006, thereby ensuring that broadcasters will be able to maintain their advertising revenues. Thus, there is no chance that a broadcaster's viability will be threatened during the transition period by the absence of a digital must-carry requirement.

---

[65] Turner II at 1196.

In fact, digital transmission will transform the economics of broadcasting by dramatically increasing broadcasters' potential sources of new revenue. As former Chairman Hundt described this fundamental transformation:

> The new digital transmission of broadcast will be capable of many wondrous services. With one misnamed "channel" of six megahertz of spectrum, a tower here in Nashville could broadcast to every PC, telephone, computer, and television in the city simultaneously four or five TV shows, and a couple of software programs, and a newspaper, and a phone book, and movies for storage in the VCR (if VCRs still exist). If we gave out, say, five blocks of six megahertz each, we could enable five digital broadcasters to deliver 20 to 30 channels of programs. This could be local competition for cable. ... The digital transmission technology is so supple and flexible that the possibilities of serving the public interest are staggering. And the commercial possibilities are beyond the dreams of avarice. If digital broadcast gained just 10% of the advertising business in this country, it would increase today's TV revenues by half![66]

In such a transformed broadcasting industry, any assertion of the need for digital must carry during the transition period breaks down of its own weight. This is especially true given that broadcasters were given an additional 6 MHz of DTV spectrum for free and were accorded unlimited flexibility by the Commission to use this DTV spectrum for applications other than HDTV. MediaOne strongly opposes the notion that an industry which inherits $40 billion worth of "prime beach front property in the air,"[67] and is permitted to use it for various revenue-generating applications unrelated to universally available free television, will be accorded significantly enlarged must-carry rights on cable systems.

---

66 Reed Hundt, Chairman, Federal Communications Commission, Speech Before the Industry Leadership Conference, Information Technology Association of America, Nashville, Tennessee, October 9, 1995, at 8, 9-10.

67 Id. at 8.

In short, these factors -- continued carriage of the broadcasters analog feed during the transition period and new revenue streams afforded by the digital broadcast feed -- prevent the Commission from asserting that the imposition of digital must carry during the transition period is necessary to promote the governmental interest held to be important by Turner II, namely the preservation of free, over-the-air broadcasting.

This conclusion is supported by the fact that the Commission cannot show that, when enacting Section 614 in 1992, there was any evidence before Congress, let alone substantial evidence, that could be construed as supporting the imposition of transitional digital must-carry rules. Congress' findings supporting analog must-carry requirements are wholly irrelevant to transitional digital must carry. For example, the Turner II Court relied heavily upon Congress' findings that local broadcasters had been dropped in the absence of must-carry rules.[68] To date, however, no local broadcaster's digital transmission has commenced and therefore no digital broadcast signal has been dropped. Furthermore, the Turner II Court pointed to congressional findings that "broadcast stations had fallen into bankruptcy, curtailed their broadcast operations, and suffered serious reductions in operating revenues as a result of adverse carriage decisions by cable systems"[69] as support for analog must carry. Yet, again, because digital broadcasts have not yet commenced, there is no indication that broadcasters will suffer similarly in the digital context. The Commission simply cannot show substantial evidence to justify the rules.

---

[68] See Turner II at 1193 (stating that "between 19 and 31 percent of all local broadcast stations, including network affiliates, were not carried by the typical cable system.").

[69] See id. at 1195 (citations omitted).

The Commission acknowledges this conclusion in the Notice by asserting that it intends to use this proceeding to "build a record" to find the important governmental interest to be served and the factual predicate supporting such a governmental interest.[70] This assertion itself reveals the weakness in the Commission's claim of authority to impose transitional digital must-carry rules. While the Commission cites Section 614 as its authority to enact transitional digital must-carry regulations,[71] it simultaneously admits that the congressional findings and evidence which underlie Section 614 are entirely inadequate to support digital must carry.[72] Moreover, as shown in the next section, the Commission is unable to assert, or to provide substantial evidence in support of, any governmental interest other than the one upheld in Turner II which could justify the imposition of digital must carry during the transition period.

2. The Imposition Of Digital Must-Carry Rules During The Transition Period Is Not Necessary To Further Any Governmental Interest Other Than The One Upheld In Turner II.

As noted, the Commission has stated that its authority to adopt a digital must-carry rule derives from Section 614 of the Communications Act and a sentence in the legislative history of Section 309(j) of the 1997 Balanced Budget Act.[73] However, as shown above, neither of these

---

70 See Notice at ¶ 16.

71 See id. at ¶ 13.

72 See id. at ¶ 16 ("[W]e find it essential to build a record relating to the interests to be served by any digital broadcast signal carriage rules [and] the factual predicate on which they would be based.").

73 See id. at ¶ 13. The Commission properly does not cite in the Notice general provisions of the Act, such as Section 4(i), which are insufficient to authorize a transitional digital must-carry rule, particularly in light of the fact that Section 614 is a specific provision dealing with must carry. In fact, Section 614(b)(4)(B) addresses digital must carry and, as shown above, does not authorize such an

(footnote continued...)

provisions authorizes the Commission to adopt a transitional digital must-carry rule, or provides a substantial governmental interest to support a transitional rule. The Commission may not use this proceeding to manufacture a new "substantial or important" governmental interest for transitional digital must carry, because, under its own analysis, the Commission is constrained to act in this area pursuant to Sections 614 and 309(j). Indeed, as noted above, since Congress did not expressly bestow upon the Commission in Title VI of the Communications Act the authority to impose transitional digital must-carry requirements, the Commission is precluded by Section 624(f) from doing so.[74]

Moreover, even assuming that the Commission were authorized to look to its general statutory authority to attempt to find a new governmental interest that supports digital must carry during the transition, it will be unable to develop a sufficient record to meet the intermediate scrutiny standard's substantial evidence test. Both the Quincy and Century Courts held that, despite the evidence adduced by the Commission pursuant to its rulemaking authority, the Commission failed to demonstrate that the prior (pre-1992 Act) analog must-carry rules were necessary to further an important or substantial governmental interest.[75] The Century decision is

---

(... footnote continued)

obligation during the transition period. Had Congress intended a transitional digital must-carry obligation, it easily could have made that clear in the statute.

[74] See 47 U.S.C. § 544(f) ("Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Communications Act].") (emphasis added).

[75] See Quincy Cable TV, Inc. v. Federal Communications Commission, 768 F.2d 1434 (D.C. Cir. 1985) ("Quincy"); Century Communications Corp. v. Federal Communications Commission, 835 F.2d 292 (D.C. Cir. 1987) ("Century").

particularly relevant because the analog must-carry rules struck down in that case were interim rules, similar in nature to the transitional rules proposed in this proceeding, and were enacted pursuant to evidence gathered in a Commission rulemaking proceeding, as the Commission is contemplating here.[76] Yet, although "the Commission took note of the many comments,"[77] the Century Court ultimately held that "when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures."[78] The Commission's authority to enact any must-carry rules through the rulemaking process, let alone during a period in which the broadcaster's analog signal already is carried, is highly dubious in light of the fact that the courts have twice invalidated such rules. Indeed, Congress has even suggested that signal carriage obligations could only be enacted pursuant to congressional authorization, not agency rulemaking.[79] And it is well-established that

---

[76] After the District of Columbia Circuit Court invalidated the analog rules under Quincy, the Commission initiated another rulemaking to adopt "modified" must-carry obligations. See Century at 295. These modified must-carry rules were designed to "guarantee [] access during a shorter-term transition period during which viewers could become accustomed to an existing and inexpensive ... piece of equipment known as the 'input-selector device'." Id. at 296. However, despite the evidence gathered by the Commission through its rulemaking proceeding, the Court held that "here, as in Quincy Cable TV, the FCC's judgment that transitional rules are needed is predicated not upon substantial evidence but rather upon several highly dubious assertions." Id. at 300.

[77] See id. at 295.

[78] See id. at 304.

[79] See 1992 Cable Act House Report at 58 (stating that Congress "recognize[d] that two previous versions of must-carry regulation imposed by FCC rulemaking were held unconstitutional by the United States Court of Appeals for the District of Columbia Circuit" but that these decisions did "not foreclose Congress from crafting valid regulations for cable carriage of local television signals.") (emphasis added).

in reviewing the constitutionality of a statute or rule, courts will accord greater deference to the predictive judgments of Congress than to those of an agency.[80]

Moreover, Section 614 was enacted only after years of congressional fact-finding. When Congress contemplated legislating analog must-carry requirements, analog broadcasting was a well-established industry, more than 50 years old. Notwithstanding that the analog broadcast business was mature and the Congress familiar with it, three years of congressional hearings were held before enacting Section 614,[81] and the District Court, after the Supreme Court's decision in Turner I, conducted an additional eighteen months of fact-finding.[82] Even after such an extensive multi-year investigation by Congress, analog must carry barely survived constitutional review by a 5-4 Supreme Court vote. By contrast, because digital broadcasting itself is so new, any proposed transitional digital must-carry rules simply lack the history which led to -- and which the Supreme Court held supported -- the analog signal carriage requirements adopted in the 1992 Cable Act. The transition to digital broadcasting has just commenced, and the video programming industry is undergoing rapid technological change; digital broadcasts are not set to start on a large scale until

---

80 See, e.g., Turner II at 1189 ("In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. Our sole obligation is to ensure that in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence. [S]ubstantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency.") (internal quotations and citations omitted); Century at 299 ("[T]he Supreme Court has often noted that the substantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake.").

81 See Turner II at 1185 (stating that the congressional record consisted of "three years of preenactment hearings").

82 See id. (stating that the Court obtained "additional expert submissions, sworn declarations and testimony, and industry documents").

1999; and consumers have only recently been able to purchase DTV receivers.[83] Thus, by comparison, the digital broadcast record is paltry, at best. This fact cannot be overcome through the submission of comments and reply comments in the instant Commission rulemaking.

B. The Imposition Of Digital Must-Carry Rules During The Transition Period Would Burden Substantially More Speech Than Is Necessary To Further Any Putative Governmental Interest, And Therefore Would Fail The "Narrow Tailoring" Requirement.

Even if the Commission can establish that transitional digital must-carry rules serve an important or substantial governmental interest, such rules would nonetheless fail the second prong of the intermediate scrutiny test, i.e., the "narrow tailoring" requirement. In order to show that its regulations are narrowly tailored, the government must prove that its rules infringe no more speech than is necessary to alleviate the harms underlying the rule.[84]

The Commission cannot satisfy this requirement because the burden that would be placed on cable operators' speech by transitional digital must-carry rules would be significant, and far greater than the burden imposed by the analog must-carry rules. For example, a critical part of the justification of analog must carry in Turner II was that the analog must-carry regulations did not burden substantially more speech than necessary because, among other things, cable operators had carried most broadcast signals prior to the implementation of the rules.[85] The same cannot be

---

[83] See, e.g., K. Pope and E. Ramstad, "HDTV Sets: Too Pricey, Too Late?" Wall St. J., at B1 (Jan. 7, 1998); J. Brinkley, "Ready or Not, Here Comes HDTV," N.Y. Times, at D1 (Apr. 6, 1998).

[84] See Turner I at 662.

[85] See Turner II at 1198 (noting that "cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry."). Similarly, Congress was encouraged to draft the analog must-carry legislation because "the great majority of the capacity of any cable system

(footnote continued...)

said of digital broadcast signals during the transition period. Cable operators currently carry no digital broadcast signals. Thus, each additional digital programming service afforded mandatory cable carriage rights would result in a 100% increase over current digital broadcast carriage, thereby significantly infringing on a cable operator's editorial discretion in selecting which programming services, and in what combinations, it will offer the public.[86]

Thus, the Turner II Court's reasoning concerning the burden on cable operators' speech posed by analog must-carry regulations is inapposite to the proposed transitional digital must-carry rules. As shown above, the imposition of digital must-carry rules during the transition period would burden substantially more cable operator speech than is necessary to further any asserted governmental interest, and, therefore, the narrow-tailoring prong of the intermediate First Amendment scrutiny test cannot be satisfied.

(... footnote continued)

... is unaffected by signal carriage regulations." See 1992 Cable Act House Report at 62. In other words, the burden on cable speech was thought to be relatively small.

[86] The Supreme Court has repeatedly held that cable operators are "speakers" under the First Amendment. See, e.g., City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986) ("The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment.... Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable operators] seek[] to communicate messages on a wide variety of topics and in a wide variety of formats."); Leathers v. Medlock, 499 U.S. 439, 444 (1991) ("Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'."). See also Federal Communications Commission v. Midwest Video Corp., 440 U.S. 689, 707 (1979).

V. CONCLUSION

For the foregoing reasons, MediaOne respectfully submits that the imposition of digital must carry during the transition period is both beyond the Commission's statutory authority and contrary to the First Amendment. Even assuming arguendo that such Commission action were legally permissible, given the significant progress being made by the cable and broadcast industries to negotiate carriage of digital signals and to establish technical standards for such carriage, as well as the highly dynamic and complex nature of the digital video marketplace, the Commission should not adopt a transitional digital must-carry requirement. Such an approach is particularly warranted because transitional digital must carry would ignore consumer preferences and reduce program diversity and quality simply to afford undeserved preferential treatment to broadcasters' digital feeds.

Respectfully submitted,

MEDIAONE GROUP, INC.

Susan M. Eid / fmb

Susan M. Eid
David Rubashkin
Margaret Sofio
MediaOne Group, Inc.
1919 Pennsylvania Avenue, N.W.
Suite 610
Washington, D.C. 20006
(202) 261-2000

October 13, 1998